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Supreme Court of the United States

OCTOBER TERM 1967

No. 680

BREGMAN, VOCCO AND CONN, INC.,
Petitioner,

—against—

DONALDSON PUBLISHING CO.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY BRIEF

Although Respondent concedes that the decision below is of "compelling importance to the music industry", its brief has failed to meet, and indeed has largely ignored, Petitioner's principal arguments with respect to the issues presented.

1. **As to Rule 52 (a).** The first issue presented by the Petition is whether it was error for the Court of Appeals to reject the "clearly erroneous" test prescribed by Rule 52(a), when the trial court, in order to reach its decision, necessarily drew inferences from evidentiary facts, evaluated disputed oral testimony and interpreted ambiguous evidence.

Respondent, in Point I of its brief, attempts to evade this issue by claiming that the Court of Appeals either passed solely upon a question of law or merely corrected the trial court's application of a legal standard to undisputed facts and documentary evidence.

This claim is unsupported by the record or by any statement in the Court of Appeals' opinion. Moreover, Respondent, in order to make the claim, has necessarily ignored entirely, in Point I of its Brief, the content and even the existence of all oral testimony adduced at trial.

The fact is that both the District Court and the Court of Appeals regarded the nature of Donaldson's relationship to Petitioner—i.e., whether or not Petitioner had been Donaldson's "employer for hire"—as a question necessarily involving an evaluation or interpretation, not only of the preincorporation and employment agreements, but also of other documents, testimony and surrounding circumstances. Among others, these included:

(a) The minutes of the first meeting of the Board of Directors, initialed by Donaldson, which referred to Donaldson's agreement with Petitioner as an employment contract;

(b) The oral testimony of Douglas, the only surviving party to the original agreement, that the parties intended "employment";

(c) The oral testimony of Schwartz, the attorney who drafted the documents, who stated that he understood the agreement to be one of "employment";

(d) Powers' testimony that Donaldson himself regarded his agreement with Petitioner as an "employment contract"; and

(e) The subsequent acts of the parties insofar as relevant to their intent, and inferences to be drawn from those acts, such as that Donaldson had bound himself to compose for Petitioner "exclusively"; that Petitioner was given the right to, and did, copyright Donaldson's compositions in its own name; that Donaldson never reserved or asserted any rights in such copyrights; that Donaldson was to and did serve as the President of the Petitioner in addition to being an owner of one-third of its stock; and that Donaldson was to receive a fixed weekly compensation, which was payable to him regardless of whether any of his compositions ever earned a penny in royalties.

In the light of these considerations, Respondent's reliance on *In re Hygrade Envelope Corp.*, 366 F. 2d 584 (2d Cir. 1966), is obviously misplaced, since *Hygrade* involved no factual issues. The trial and appellate courts were there concerned with the formulation of a legal standard of care applicable to creditors in bankruptcy cases where the facts were undisputed. Even so, the Second Circuit observed that its view as to the inapplicability of Rule 52(a) in such circumstances was in conflict with the view of other circuits, saying (p. 589):

> "The Security-First Nat. Bank holding is indeed consistent with the Ninth Circuit's general view that a judge's decision on the issue of reasonable care is a finding of fact protected by the 'unless clearly erroneous' rule, see Pacific Tow Boat Co. v. States Marine Corp., 276 F. 2d 745, 752 & n. 12 (9 Cir. 1960), and cases cited. But we have adhered to our long held contrary position in face of that court's disapproval, [citations omitted] and have reaffirmed our view as recently as Mamiye Bros. v. Barber S. S. Lines, Inc., supra."

The authorities cited at page 14 of Respondent's brief are all inapposite to the issues here posed. *United States Gypsum Co.* and *Parke Davis & Co.* were antitrust cases, where the issue was whether as a matter of law certain admitted business practices violated the Sherman Act. *Baumgartner* was a denaturalization case, in which this Court reversed because of the Government's failure to meet a standard of proof peculiar to a case involving the "duties and immunities of citizenship". *Beyer* v. *LeFevre* merely held that a jury verdict could be set aside where it was "wholly unwarranted" by the evidence. *Skelly Oil* presented an issue of law as to proper administrative procedures under the Natural Gas Act, and *Mamiye,* like *Hygrade,* involved the formulation of a legal standard of care in relation to undisputed facts. None of these cases dealt even remotely with the applicability of Rule 52(a) to the resolution of factual issues turning upon an evaluation of disputed oral testimony or an interpretation of ambiguous evidence or inferences drawn from evidentiary facts—elements all present in this case.

We submit that Respondent's efforts to excuse the Court of Appeals' express refusal to adhere to the mandate of Rule 52(a) are without substance. And by rejecting that

Rule, the Court of Appeals plainly exceeded the power of review with which it is vested.

We repeat that this is a clear case in which this Court should exercise its supervisory jurisdiction to require compliance with and uniformity in the application of the rules governing appellate review. Particularly is this so when the Second Circuit has directly stated, in indulging in its propensity to "free" itself from the limitations of the Rule, that its position as to the application of the Rule is in conflict with that of the Ninth Circuit (*See Hygrade, supra,* p. 2).

2. **As to Respondent's treatment of the evidence.** In Point II of its brief, Respondent argues in essence that the findings of the District Court were "clearly erroneous", even though the Opinion of the Court of Appeals did not characterize them as such. We do not propose in this reply brief to answer each of Respondent's arguments as to the import which should attach to various aspects of the evidence.

Respecting the language of the Donaldson employment agreement (Resp. Br. pp. 16-18), we have dealt *in extenso* in our Petition with the genesis and meaning of that document. Respecting the claims predicated on the nature of Donaldson's compensation and the absence of any contractual provisions dealing with "control"*, our earlier discussion of these points needs no elaboration. We do think that it is of the utmost significance, in the light of the real issues here raised, that Respondent's references to the "oral testimony" (Resp. Br. pp. 21-22) simply represent attacks "upon the probative value" of the testimony of the witnesses —testimony which was considered and evaluated by the trial court.

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*It is clear from the evidence that Donaldson was not "free" to render services to others, and Respondent does not dispute that, in the few instances in which Donaldson wrote songs for others, the arrangements were made by and with the consent of the Petitioner.

Furthermore, and contrary to Respondent's contention, none of that testimony was in conflict with the documentary proof—but directly supported the trial court's interpretation of that proof. It was completely consistent with the use of the word "employment" in Donaldson's agreement with Petitioner. And none of Respondent's efforts to belittle the importance of the use of that word, nor the rationalization of the Court below as to its meaning, can detract from its compelling significance.

In sum, we urge that Respondent's own argumentative treatment of selected portions of the record and its attack on the credibility of the witnesses negate its claim that the Court of Appeals reversed solely on an issue of law. Rather, they underscore the fact that the District Court based its decision on a determination of sharply disputed issues of fact and demonstrate that its findings were amply supported by the record.

If the Court of Appeals had agreed with Respondent that the findings of the District Court were "clearly erroneous", we think it manifest that it would have so held. And certainly Respondent offers no explanation of why the court failed to do so, and deemed it necessary, instead, expressly to decline to follow Rule 52(a).

3. **The nature of Petitioner's rights.** Even though the evidence establishes no reservation of rights by Donaldson, Respondent argues, in Point III of its brief, that Petitioner was a mere licensee. This is said to be so because the publication and mechanical rights were the only rights specifically referred to in Petitioner's contract with Donaldson.* It is obvious, however, that these two principal sources of copyright revenue were specifically referred to for the purpose of measuring the precise royalties to which Donaldson,

*It should be noted that when the contracts in question were executed in 1928, publication and mechanical rights were the major rights as then known for the development of revenue from the exploitation of musical compositions.

his heirs and successors were to be entitled during the original and renewal terms of the copyrights, by virtue of Donaldson's services to Petitioner.

Respondent also argues in Point III that Petitioner, as the mere licensee of publication and mechanical rights, held all copyrights in trust for Donaldson. This argument, however, simply begs the question, since Petitioner would hold the copyrights in trust for Donaldson only if (a) it were not Donaldson's "employer for hire" and (b) the "corporate body" provision of Section 24 were inapplicable.

4. **As to the "corporate body" provision of Section 24.** The Court of Appeals asserted in its opinion that the "corporate body" provision of Section 24 of the Copyright Act was infrequently invoked, limited in scope, and not entirely plain. Respondent goes further: Point IV of its brief is premised on the claim that the provision is "for all practical purposes, meaningless". Respondent even asserts (quite erroneously) that the authorities unanimously share its view.

This premise ignores the well-settled principle that Congress cannot be presumed to have used words without meaning, and that effect should be given, wherever possible, to every statutory provision (*See, e.g., Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208). It also ignores or overlooks the significant fact that the same statutory language appears in the proposed new Copyright Act. H. R. 2512, § 304(a). As to this, Respondent's statement that the provision in question has been "eliminated" from the proposed statute is seriously misleading. Obviously, the "corporate body" language was eliminated as to *new* works because the proposed statute does not provide for renewals of copyright to such works.

Respondent does not even purport to meet Petitioner's main arguments as to the applicability of the "corporate body" provision. Instead, it suggests, again inaccurately, that the provision should not apply because the parties sought to fix their rights by express contract, although not

one word with respect to renewal rights appears in any of the documents contained in the record.*

Moreover, Respondent simply obscures the issue when, at various points in its brief, it refers to the fact that Petitioner, in applying for registration of its copyrights, described Donaldson as the "individual author". While a corporation can, for Copyright Act purposes, be an "author" and thus acquire copyright ownership, including renewal rights, it is obviously never the "individual author" of a literary or musical work within the ordinary meaning of those words. The references to Donaldson in the Copyright Office application forms for registration of copyright were merely descriptive of who wrote the music and obviously have no more proprietary import than the credit lines in the opening frames of a motion picture. They are in no way inconsistent with Petitioner's position that it is "the author" within the meaning of 17 U. S. C. § 24.

Respondent's treatment of the "individual author" point is one example, among many, of its preoccupation with detail and its correlative refusal to come to grips with Petitioner's arguments as to why the "corporate body" provision of Section 24 should here apply. Contrary to Respondent's assertion that the authorities unanimously view the provision as "meaningless", Copyright Office Study No. 31 (1960) cites the following as one of several situations when the provision should apply:

> "A work written by an official or a major stockholder of a corporation, where the work was written directly for the corporation but not as an employees [sic] for hire."**

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*The absence of any reference to renewal rights is of course consistent with and corroborative of Petitioner's position that it was Donaldson's employer for hire. As such, Petitioner was the owner of the renewal as well as the original copyrights, and there was no need, therefore, to refer to renewal rights in the employment agreement.

**Study No. 31, prepared for the Senate Judiciary Committee as part of the copyright law revision series, p. 137, fn. 215.

Petitioner pointed out (Petition, p. 31) that, assuming, *arguendo,* Donaldson were not an "employee for hire", the foregoing example fits precisely the undisputed facts of this case. To this Respondent has made no reply.

CONCLUSION

Apart from our belief that the decision below is erroneous, we have petitioned this Court because that decision represents an unjustified precedent of extreme significance in the field of copyright law, generally, and was predicated on a misconception of the power of the Court of Appeals to reject the mandate of Rule 52(a) which is in conflict with the decisions of other Circuits and of this Court. Nothing Respondent has said derogates from the importance, procedurally and substantively, of the issues presented. For the reasons set forth herein and in the Petition, we again submit that the Writ of Certiorari should be granted.

Respectfully submitted,

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